



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648- XD248]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Site Characterization Surveys in the Area of Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf Lease Areas OCS-A 0486, 0487, and 0500

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; request for comments on proposed renewal incidental harassment authorization.

SUMMARY: NMFS received a request from Orsted Wind Power North America LLC (Orsted) for the renewal of their 2022 incidental harassment authorization (IHA) (hereinafter, the 2022 IHA is referred to as the “initial IHA” and the requested IHA is referred to as the “Renewal IHA”) to take marine mammals incidental to marine site characterization surveys, using high-resolution geophysical (HRG) equipment, in coastal waters from New York to Massachusetts, including the Bureau of Ocean Energy Management (BOEM) Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf (OCS) Lease Areas OCS-A 0486, 0487, 0500 and along potential export cable routes (ECR). The activities are identical to those covered under the initial IHA, which expires on October 5, 2023. Pursuant to the Marine Mammal Protection Act (MMPA), prior to issuing the initial IHA, NMFS requested comments on both the proposed IHA and the potential for renewing the initial authorization if certain requirements were satisfied. The renewal requirements have been satisfied, and NMFS is now providing an additional 15-day comment period to allow for

any additional comments on the proposed renewal not previously provided during the initial 30-day comment period. If issued, the renewal IHA would be effective from the date of issuance.

DATES: Comments and information must be received no later than [*INSERT DATE 15 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER***].

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service and should be submitted via email to ITP.Lock@noaa.gov.

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period.

Comments, including all attachments, must not exceed a 25-megabyte file size. All comments received are a part of the public record and will generally be posted online at www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act without change. All personal identifying information (*e.g.*, name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at:

www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities. In case of problems accessing these documents, please call the contact listed below.

FOR FURTHER INFORMATION CONTACT: Karolyn Lock, Office of Protected Resources, NMFS, (301) 427-8401.

SUPPLEMENTARY INFORMATION:

Background

The Marine Mammal Protection Act (MMPA) prohibits the “take” of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are promulgated or, if the taking is limited to harassment, an incidental harassment authorization is issued.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). NMFS must prescribe the permissible methods of taking and other “means of effecting the least practicable adverse impact” on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to here as “mitigation measures”). NMFS must also prescribe requirements pertaining to monitoring and reporting of such takings. The definitions of key terms such as “take,” “harassment,” and “negligible impact” can be found in the MMPA and NMFS implementing regulations (*see* 16 U.S.C. 1362; 50 CFR 216.3; 50 CFR 216.103).

NMFS’ regulations implementing the MMPA at 50 CFR 216.107(e) indicate that IHAs may be renewed for additional periods of time not to exceed one year for each reauthorization. In the notice of proposed IHA for the initial IHA, NMFS described the circumstances under which we would consider issuing a renewal for this activity, and requested public comment on a potential renewal under those circumstances. Specifically, on a case-by-case basis, NMFS may issue a 1-time 1-year renewal of an

IHA following notice to the public providing an additional 15 days for public comments when (1) up to another year of identical, or nearly identical, activities as described in the Detailed Description of Specified Activities section of the initial IHA issuance notice is planned, or (2) the activities as described in the Description of the Specified Activities and Anticipated Impacts section of the initial IHA issuance notice would not be completed by the time the initial IHA expires and a renewal would allow for completion of the activities beyond that described in the **DATES** section of the notice of issuance of the initial IHA, provided all of the following conditions are met:

1. A request for renewal is received no later than 60 days prior to the needed renewal of the initial IHA effective date (recognizing that the renewal's expiration date cannot extend beyond 1 year from expiration of the initial IHA);
2. The request for renewal must include the following:
 - An explanation that the activities to be conducted under the requested renewal are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.*, reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take); and
 - A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized; and
3. Upon review of the request for renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

An additional public comment period of 15 days (for a total of 45 days), with direct notice by email, phone, or postal service to commenters on the initial IHA, is

provided to allow for any additional comments on the proposed renewal. A description of the renewal process may be found on our website at:

www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals. Any comments received on the potential renewal, along with relevant comments on the initial IHA, have been considered in the development of this proposed IHA renewal, and a summary of agency responses to applicable comments is included in this notice. NMFS will consider any additional public comments prior to making any final decision on the issuance of the requested renewal, and agency responses will be summarized in the final notice of our decision.

National Environmental Policy Act

This action is consistent with categories of activities identified in Categorical Exclusion B4 (incidental take authorizations with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216-6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS determined that the issuance of the initial IHA qualified to be categorically excluded from further NEPA review. NMFS has preliminarily determined that the application of this categorical exclusion remains appropriate for this Renewal IHA.

Summary of Request

On October 6, 2022, NMFS issued an IHA to Orsted to take small numbers of marine mammals incidental to marine site characterization surveys in Federal and state waters located in Lease Areas OCS-A 0486, 0487, 0500 off the coasts from New York to Massachusetts and along potential ECRs to landfall locations between Raritan Bay (part of the New York Bight) and Falmouth, Massachusetts. On May 26, 2023, NMFS received a request for a renewal of that initial IHA because Orsted's marine site

characterization surveys under the initial IHA had not yet occurred and more time is required. As described in the application for the Renewal IHA, the activities for which incidental take is requested are identical to those covered by the initial IHA. However, Orsted decreased the number of survey days from 400 to 390 based on the assumption that subsidiaries of Orsted will have separate incidental take authorizations for marine site characterization surveys in Lease Areas OCS-A 0486 (Revolution Wind; 88 FR 8996, February 10, 2023) and OCS-A 0487 (Sunrise Wind; 87 FR 79072, January 19, 2023) during the proposed effective period of the Renewal IHA. NMFS is proposing to authorize incidental take through this proposed Renewal IHA assuming 400 survey days will be necessary as NMFS has not promulgated final rules for Revolution Wind and Sunrise Wind.

As no work has commenced under the initial IHA, Orsted cannot provide a preliminary monitoring report. However, if work occurs before the effective date of the proposed Renewal IHA, a preliminary monitoring report would be required and be made available on NMFS' website (available at

<https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable>) and would detail any implemented mitigation and monitoring and show that no impacts of a scale or nature not previously analyzed or authorized have occurred as a result of the activities conducted. Orsted has complied with all the requirements (*e.g.*, mitigation, monitoring, and reporting) of the previous IHAs in Lease Areas OCS-A 0486, 0487, and 0500 (84 FR 52464, October 2, 2019; 85 FR 63508, October 8, 2020; 87 FR 13975, March 11, 2022).

On August 1, 2022, NMFS announced proposed changes to the existing North Atlantic right whale vessel speed regulations to further reduce the likelihood of mortalities and serious injuries to endangered North Atlantic right whales from vessel collisions, which are a leading cause of the species' decline and a primary factor in an

ongoing Unusual Mortality Event (87 FR 46921). Should a final vessel speed rule be issued and become effective during the effective period of this proposed Renewal IHA (or any other MMPA incidental take authorization), the authorization holder would be required to comply with any and all applicable requirements contained within the final rule. Specifically, where measures in any final vessel speed rule are more protective or restrictive than those in this or any other MMPA authorization, authorization holders would be required to comply with the requirements of the rule. Alternatively, where measures in this or any other MMPA authorization are more restrictive or protective than those in any final vessel speed rule, the measures in the MMPA authorization would remain in place. These changes would become effective immediately upon the effective date of any final vessel speed rule and would not require any further action on NMFS's part.

Description of the Specified Activities and Anticipated Impacts

Orsted plans to conduct marine site characterization surveys, specifically HRG surveys, in the Lease Areas OCS-A 0486, 0487, 0500 and ECR Area in Federal and state waters from New York to Massachusetts to support the characterization of the existing seabed and subsurface geological conditions, which is necessary for the development of an offshore electric transmission system. The project would use active acoustic sources, including some with potential to result in the incidental take of marine mammals by Level B harassment.

This proposed Renewal IHA is identical to the initial IHA and conservatively assumes no work will occur for the remainder of the initial IHA.

The Renewal IHA would authorize incidental take, by Level B harassment only (in the form of behavioral disturbance), of 16 species or stocks of marine mammals for identical marine site characterization survey activities to be completed in one year, in the same area, using survey methods identical to those described in the initial IHA

application. Therefore, the anticipated effects on marine mammals and the affected stocks also remain the same. The amount of take, by Level B harassment, requested for the Renewal IHA is also identical to that authorized in the initial IHA. All mitigation, monitoring, and reporting measures would remain exactly as described in the **Federal Register** notice of the issued initial IHA (87 FR 61575, October 12, 2022).

Detailed Description of the Activity

A detailed description of the marine site characterization survey activities for which incidental take is proposed here may be found in the **Federal Register** notice of the proposed IHA (87 FR 52515, August 26, 2022) for the initial authorization. The location and nature of the activities, including the types of equipment planned for use, are identical to those described in the previous notices.

Table 1 -- Number of Survey Days for each Lease Area and ECR¹

Area	IHA Total Number of Survey days ²
OCS-A-0486	10
OCA-A-0487	10
OCS-A-0500	200
ECR	180
TOTAL	400

1- Up to three total survey vessels may be operating within both of the survey areas concurrently. Orsted estimated it would conduct surveys at a rate of 70 kilometers (km) per survey day.

2- NMFS proposes to authorize work for the same number of vessel days as described in the initial IHA.

Description of Marine Mammals

A description of the marine mammals in the area of the activities for which authorization of take is proposed here, including information on abundance, status, distribution, and hearing, may be found in the **Federal Register** notice of the proposed IHA for the initial authorization (87 FR 52515, August 26, 2022). NMFS has reviewed the recently finalized 2022 Stock Assessment Reports (SARs), which included updates to stock abundances since the initial IHA was issued, information on relevant Unusual

Mortality Events, and other scientific literature. In August 2023, NMFS released its final 2022 SARs, which updated the population estimate (N_{best}) of North Atlantic right whales from 368 to 338 and annual mortality and serious injury increased from 8.1 to 31.2. This large increase in annual serious injury/mortality is a result of NMFS including undetected annual mortality and serious injury in the total annual serious injury/mortality, which had not been previously included in the SARs. The population estimate is slightly lower than the North Atlantic Right Whale Consortium's 2022 Report Card, which identifies the population estimate as 340 individuals (Pettis *et al.*, 2023). NMFS has determined that neither this nor any other new information affects which species or stocks have the potential to be affected or any other pertinent information in the Description of the Marine Mammals in the Area of Specified Activities contained in the supporting documents for the initial IHA.

Potential Effects on Marine Mammals and Their Habitat

A description of the potential effects of the specified activity on marine mammals and their habitat for the activities for which take is proposed here may be found in the **Federal Register** notice of the proposed IHA for the initial authorization proposed (87 FR 52515, August 26, 2022). NMFS has reviewed information on relevant Unusual Mortality Events, the 2022 SARs, and other scientific literature and data, and preliminarily determined that there is no new information that affects our initial analysis of impacts on marine mammals and their habitat.

Estimated Take

A detailed description of the methods and inputs used to estimate take for the specified activity are found in the notices of the proposed (87 FR 52515, August 26, 2022) and issued (87 FR 61575; October 12, 2022) IHAs for the initial authorization. Specifically, the acoustic sources and levels, survey days, and marine mammal density applicable to this authorization remain unchanged from the initial IHA. Similarly, the

stocks taken, methods of take and type of take (*i.e.*, Level B harassment in the form of behavioral disturbance) remain unchanged from the initial IHA.

As was done in the initial IHA, Orsted requested a deviation from the calculated take for some species given to account for group size or observations during surveys in the surrounding area. Other than in the instances described below, Orsted's requested take matches their initial IHA. Orsted's Renewal IHA request references new data sources to inform group sizes for humpback whale (collected under the Northeast Projects IHA (87 FR 13975, March 11, 2022)), minke whale (Kenney and Vigness-Raposa, 2010); and Risso's dolphin (Barkaszi and Kelly, 2019). When these group size data were considered, the takes requested by Orsted for these species in their application were equal to or less than that authorized under the initial IHA. However, NMFS proposes to authorize the same number of incidental takes for all species as the initial IHA as the activities are identical and NMFS considers the data sources used in the initial IHA the best scientific information available.

During consideration of this Renewal IHA request, a typographical error in the proposed and notice of issuance **Federal Register** publications was identified that stated 17 pilot whales were authorized for take when 52 were requested and authorized within the IHA (as stated in the initial IHA application and issued IHA). The number of takes included in the Renewal IHA application and within this proposed Renewal IHA is 52, which equates to 0.13 percent of the population abundance. Lastly, the stock abundance amounts used for the initial IHA were from the 2021 SARs (Hayes *et al.*, 2022), the most recent available at the time of publication; the abundance amounts used for this proposed Renewal IHA are the final 2022 SARs (Hayes *et al.*, 2023).

Table 2 -- Initial IHA Take Authorized and Renewal IHA Proposed Take by Level B Harassment¹

Species	Population Abundance ²	Take authorized initial IHA	Requested proposed take Renewal IHA	NMFS proposed take Renewal IHA ³	Percent of Population for Renewal IHA
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North Atlantic right whale ⁴	338	17	16	17	5.03
Humpback whale	1,396	34	19	34	2.44
Fin whale	6,802	14	14	14	0.21
Sei whale	6,292	3	3	3	0.05
Minke whale	21,968	13	9	13	0.06
Sperm whale	4,349	2	2	2	0.05
Long-finned Pilot whale ⁵	39,215	52	52	52	0.13
Bottlenose dolphin ⁶	62,851	139	139	139	0.22
Common Dolphin	172,974	6,000	6,000	6,000	3.47
Atlantic white-sided dolphin	93,233	210	206	210	0.23
Atlantic spotted dolphin	39,921	29	29	29	0.07
Risso's dolphin	35,215	30	30	30	0.09
Striped dolphin	67,036	20	20	20	0.03
Harbor porpoise	95,543	287	279	287	0.30
Gray seal	27,300	118	116	118	0.43
Harbor seal	61,336	118	116	118	<0.01

1- No take by Level A harassment is anticipated nor proposed to be authorized.

2- Final 2022 SARs (Hayes et al., 2023). At the time of the issuance of the initial IHA, the 2021 SARs were used as the best available science. This table utilizes the 2022 SARs abundance numbers. The only species where the abundance number changed between the initial IHA and this proposed renewal was the North Atlantic right whale.

3- While Orsted adjusted their requested take numbers for some species based on 10 less survey days or by utilizing a different data source, NMFS proposes to authorize the same amount of take as the initial IHA; as previously described.

4- The SARs stock abundance number at the time of issuance for the initial IHA was 368. The percent of population affected under the initial IHA was 4.62%. While the total number of proposed takes remains the same between the initial IHA and this proposed renewal, due to the decrease in the population abundance to 338 (2022 SARs), the percent of the population affected would increase slightly to 5.03%.

5- While the original Federal Register publications for the initial IHA contained a typo of 17 takes by Level B harassment instead of the 52 requested and eventually authorized, the percent abundance affected provided in those publications was correct (0.13%) as that value had been correctly calculated using 52. Therefore, as the population abundance remains unchanged from the initial IHA, the correction in this proposed renewal notice of 17 to 52 does not change the percent of the population proposed to be affected (0.13%).

6- Western North Atlantic, Offshore stock.

Description of Proposed Mitigation, Monitoring and Reporting Measures

The proposed mitigation, monitoring, and reporting measures included as requirements in this authorization are identical to those included in the **Federal Register** notice announcing the issuance of the initial IHA (87 FR 61575; October 12, 2022), and the discussion of the least practicable adverse impact determination included in that

document remains applicable and accurate. All mitigation, monitoring, and reporting measures in the initial IHA are identical this proposed Renewal IHA and summarized below.

- *Ramp-up:* A ramp-up procedure would be used for geophysical survey equipment capable of adjusting energy levels at the start or re-start of survey activities;
- *Protected Species Observers:* A minimum of one NMFS-approved Protected Species Observer (PSO) must be on duty and conducting visual observations at all times during daylight hours (*i.e.*, from 30 minutes prior to sunrise through 30 minutes following sunset). Two PSOs will be on watch during nighttime operations;
- *Pre-Operation Clearance Protocols:* Prior to initiating HRG survey activities, Orsted would implement a 30-minute pre-operation clearance period. If any marine mammals are detected within the Exclusion Zones prior to or during ramp-up, the HRG equipment would be shut down (as described below);
- *Shutdown Zones:* If an HRG source is active and a marine mammal is observed within or entering a relevant shutdown zone, an immediate shutdown of the HRG survey equipment would be required. Note this shutdown requirement would be waived for certain genera of small delphinids and pinnipeds;
- *Vessel strike avoidance measures:* Separation distances for large whales (500 m North Atlantic right whales and other ESA-listed marine mammals; 100 m for all other non-ESA listed baleen whales; 50 m all other marine mammals); restricted vessel speeds and operational maneuvers; and
- *Reporting:* Orsted will submit a marine mammal report within 90 days following completion of the surveys.

Comments and Responses

As noted previously, NMFS published a notice of a proposed IHA (87 FR 52515, August 26, 2022), and solicited public comments on both our proposal to issue the initial

IHA for marine site characterization surveys and on the potential for a renewal IHA, should certain requirements be met. All public comments were addressed in the notice announcing the issuance of the initial IHA (87 FR 61575; October 12, 2022) and none of the comments specifically pertained to the renewal of the initial IHA.

Preliminary Determinations

The survey activities proposed by Orsted are identical to those analyzed in the initial IHA, as are the method of taking and the effects of the action. The mitigation measures and monitoring and reporting requirements as described above are also identical to the initial IHA. The number of takes proposed is equal to that authorized in the initial IHA. The potential effect of the proposed activities remains limited to Level B harassment in the form of behavioral disturbance. In analyzing the effects of the activities in the initial IHA, NMFS determined that the activities would have a negligible impact on the affected species or stocks and that the authorized take numbers of each species or stock were small relative to the relevant stocks (*e.g.*, less than one-third of the abundance of all stocks).

NMFS has preliminarily concluded that there is no new information suggesting that our analysis or findings should change from those reached for the initial IHA. This includes consideration of the 2022 SAR estimated abundance of the North Atlantic right whale stock. Specifically, NMFS is proposing to authorize 17 takes of North Atlantic right whales by Level B harassment only, and the impacts resulting from the project's activities are neither reasonably expected nor reasonably likely to adversely affect the stock through effects on annual rates of recruitment or survival. Additionally, approximately 5 percent of the stock abundance is proposed for take by Level B harassment.

Based on the information and analysis contained here and in the referenced documents, including the consideration of the final 2022 SARs, NMFS has determined

the following: (1) the required mitigation measures will effect the least practicable impact on marine mammal species or stocks and their habitat; (2) the authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the authorized takes represent small numbers of marine mammals relative to the affected stock abundances; (4) Orsted's activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action; and (5) appropriate monitoring and reporting requirements are included.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally, in this case with the NMFS Greater Atlantic Regional Fisheries Office (GARFO), whenever we propose to authorize take for endangered or threatened species.

NMFS Office of Protected Resources has authorized the incidental take of four species of marine mammals which are listed under the ESA (the North Atlantic right, fin, sei, and sperm whale) and has determined that these activities fall within the scope of activities analyzed in GARFO's programmatic consultation regarding geophysical surveys along the U.S. Atlantic coast in the three Atlantic Renewable Energy Regions (completed June 29, 2021; revised September 2021). The proposed Renewal IHA provides no new information about the effects of the action, nor does it change the extent of effects of the action, or any other basis to require reinitiation of consultation with NMFS GARFO; therefore, the ESA consultation has been satisfied for the initial IHA and remains valid for the Renewal IHA.

Proposed Renewal IHA and Request for Public Comment

As a result of these preliminary determinations, NMFS proposes to issue a renewal IHA to Orsted for conducting marine site characterization surveys off New York to Massachusetts (Lease Areas OCS-A 0486, 0487, and 0500), effective from October 6, 2023 through October 5, 2024, provided the previously described mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed and initial IHA can be found at <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>. We request comment on our analyses, the proposed Renewal IHA, and any other aspect of this notice. Please include with your comments any supporting data or literature citations to help inform our final decision on the request for MMPA authorization.

Dated: September 1, 2023.

Kimberly Damon-Randall,

Director, Office of Protected Resources,

National Marine Fisheries Service.

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